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July 2, 2024

Mark Langer
Clerk of Court
U.S. Court of Appeals for the D.C. Circuit
E. Barrett Prettyman U.S. Courthouse and William B. Bryant Annex
333 Constitution Ave., NW
Washington, DC 20001

Submitted Electronically via CM/ECF

Re: No. 24-1120: *State of West Virginia, et al. v. EPA, et al.*

Dear Clerk:

We write to advise the Court of additional authority. *See* Fed. R. App. P. 28(j).

In their motion to stay, the States explained how EPA had “bungle[d] the States’ authority to set existing sources’ ‘standards of performance’ and account for source-specific factors.” ECF No. 2054190 at 18. The States have primary responsibility for implementing the Clean Air Act’s provisions, but EPA has used this Rule to relegate States to the background.

In a recent decision, the U.S. Supreme Court stayed a similar EPA effort to strip States of their central CAA role. In *Ohio v. EPA*, No. 23A349, slip op. (U.S. June 27, 2024), the States of Ohio, Indiana, and West Virginia challenged EPA’s choice to impose a faulty federal implementation plan for controlling ozone pollution across state lines. As the States do here, the Court stressed that the States take the lead—so EPA generally cannot “question the wisdom” of the States’ choices. *Id.* at 2-3. The Court also recognized how the States suffer some weighty harms when EPA

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unlawfully overreaches—EPA “necessarily impairs [the States’] sovereign interests in regulating their own industries and citizens” while also forcing them to incur “nonrecoverable” and immense compliance costs. *Id.* at 10-11. And EPA’s action in *Ohio* ultimately fell for a simple reason: EPA offered “no reasoned response” to a concern raised by multiple well-informed commenters. *Id.* at 12-13. “EPA’s response did not address the applicants’ concern so much as sidestep it.” *Id.*

So too here. The States and others have detailed exactly why EPA has trampled state authority and set impossible-to-meet standards in this carbon rule. Yet EPA has offered no reasoned response. It cited examples of *struggling* projects, not viable ones. ECF No. 2054190 at 15. It ignored the text of its own rule when minimizing that rule’s impact on state discretion. ECF No. 2060531 at 10. And it merely assumed that implausible buildouts would happen at lightning speed. *Id.* at 6.

“Stay applications are nothing new.” *Ohio*, slip. op. at 9. This Court should follow the Supreme Court’s lead in *Ohio* and stay EPA’s unlawful rule.

Sincerely,

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